MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD

v.

LEMBAGA BERSEKUTU PEMEGANG AMANAH PENGAJIAN TINGGI ISLAM MALAYSIA

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-223-1998]
13 JANUARY 2001

TORT: *Misrepresentation - Negligent misrepresentation - Loss incurred by respondent investing in company - Investment induced by appellant's false misrepresentations - Whether appellant liable for loss incurred - Whether appellant merely played role of finder to procure purchasers to buy shares of company - Whether appellant being a merchant banker owed a higher duty of care to respondent than that of a mere finder*

The appellant merchant banker appealed against the decision of the High Court which gave judgment in favour of the respondent. The respondent had claimed against the appellant for loss suffered as a result of investing in a company ('the company') induced by the appellant's false misrepresentations. The appellant was alleged to have falsely misrepresented that the company had a guaranteed dividend of 24% per annum and that it was a respectable company with a sound financial standing. However, the said guaranteed dividend did not materialise. Further, the company was not of sound financial standing and had in fact gone into receivership. The appellant alleged that the representations were made based on information supplied by the company. Further, that the appellant's role therein was merely that of a finder to procure purchasers to buy the shares of the company.

Held:
Per Shaik Daud Ismail JCA

[1] Being a merchant banker, the appellant owed a higher duty of care to the respondent than that of a mere finder. It certainly owed a higher burden when supplying any information from the company to the respondent. It ought to have ascertained and verified all information supplied by the company before passing on the information to the respondent.

[2] The representation that the directors of the company guaranteed a dividend of 24% per annum for three years was indeed a false one. Nowhere in the documents supplied by the company was there any mention of such guaranteed dividend.

[3] The other two representations could be inferred from the totality of the evidence. The appellant had painted a rosy picture of the company that it was financially sound and that any investment in it would not be a risk. Relying on the said representations, the respondent invested in the company.

[4] The respondent succeeded in establishing that the appellant owed a legal duty of care to the respondent. In making the representations, there was negligence on the part of the appellant which resulted in the respondent's loss.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu yang merupakan jurubank saudagar telah merayu terhadap keputusan Mahkamah Tinggi yang telah memberikan penghakiman kepada responden. Responden telah menuntut terhadap perayu bagi kerugian yang dialami akibat dari melabur dalam sebuah syarikat ('syarikat tersebut') yang didorong oleh salah-nyataan perayu. Perayu didakwa telah secara palsu menyalah-nyatakan bahawa syarikat tersebut mempunyai dividen yang dijamin sebanyak 24% setahun dan bahawa ianya sebuah syarikat yang dihormati dengan kedudukan kewangan yang kukuh. Walaubagaimanapun dividen yang dijamin itu tidak menjadi kenyataan. Selanjutnya, syarikat tersebut tidak berada dalam kedudukan kewangan yang kukuh dan telah pada hakikatnya berada dalam keadaan penerimaan. Perayu mendakwa bahawa representasi-representasi yang dibuat adalah berdasarkan maklumat yang diberikan oleh syarikat tersebut. Seterusnya, peranan perayu di situ adalah hanya sebagai pencari (finder) untuk memperolehi pembeli-pembeli bagi membeli saham-saham syarikat tersebut.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Sebagai jurubank saudagar, perayu haruslah melaksanakan kewajipan berjaga-jaga yang lebih teliti terhadap responden daripada hanya menjadi pencari sahaja. Ia semestinya memikul beban yang lebih berat ketika memberikan apa-apa maklumat daripada syarikat tersebut kepada responden. Ia sepatutnya memastikan dan menentusahkan kesemua maklumat yang dibekalkan oleh syarikat tersebut sebelum mengemukakan maklumat itu kepada responden.

[2] Representasi bahawa pengarah-pengarah syarikat tersebut menjaminkan satu dividen sebanyak 24% setahun selama tiga tahun adalah sesungguhnya sesuatu yang palsu. Tidak terdapat di mana-mana dalam dokumen-dokumen yang diberikan oleh syarikat yang menyebut mengenai dividen yang terjamin itu.

[3] Kedua-dua representasi yang lain itu boleh di rujuk dari keseluruhan keterangan. Perayu telah memberikan gambaran yang menarik mengenai syarikat tersebut bahawa ianya mempunyai kedudukan kewangan yang kukuh dan bahawa sebarang pelaburan ke dalamnya bukannya suatu risiko. Bergantung pada representasi-representasi tersebut, responden telah melabur dalam syarikat tersebut.

[4] Responden berjaya menunjukkan bahawa perayu haruslah melaksanakan kewajipan berjaga-jaga yang sah terhadap responden. Dalam membuat representasi-representasi tersebut, terdapatnya kecuaian di pihak perayu yang menyebabkan kerugian responden.

[Rayuan ditolak.]

Case(s) referred to:
Hedley Byrne & Co v. Heller & Partners Ltd [1963] 2 All ER 575 ***(foll)***

For the appellant - Porres P Royan (John Mathew with him); M/s Shook Lin & Bok
For the respondent - Liza Chan (Gowry Vadivelu with him); M/s Liza Chan & Co

[Appeal from High Court, Kuala Lumpur; Suit No: C 148-1981]

Reported by Usha Thiagarajah

JUDGMENT

Shaik Daud Ismail JCA:

This appeal is from the decision of the High Court, which had, on 24 March 1998, entered judgment for the respondent. The respondent is a body incorporated under the Trustee (Incorporation) (F.M.) Ordinance 1952, while the appellant are merchant bankers.

The gist of the respondent's claim against the appellant is that, the appellant's officer had represented and induced the respondent to make monetary investment in a company called Texsyn Fibres Industries Sdn. Bhd. (the company) resulting in a loss. The respondent claim damages in the sum of RM401,200. It is the contention of the respondent that they were induced into making the investment by the representations made by the officer of the appellant. The respondent allege that the appellant's officer made three basic representations, one positively in writing while the other two can be inferred from the oral and documentary evidence given to the respondent. The first direct representation was that the directors of the company had guaranteed a dividend of 24% per annum for each share for a period of three years, which representation is contained in a letter of offer dated 8 November 1974 sent to the respondent. The second representation was that the company was a respectable company and the third was that the company was of sound financial standing.

According to the amended statement of claim, the company solicited the services of the appellant as merchant bankers, to procure bumiputra purchasers of certain shares in the company. According to the evidence of one Tan Sri Abdul Aziz, the respondent's chairman, that one day in 1974 one Mohamed Tajuddin, the Corporate Finance Officer of the appellant, phoned him to ask whether he was interested in investing in the company. He said Mohamad Tajuddin also told him that the company was a very large concern with a paid up capital of RM20 million with prominent personalities from Malaysia, Hong Kong and Taiwan on its board. Following this Tan Sri Abdul Aziz received a letter dated 8 November 1974 from Mohamad Tajuddin, bearing the letterhead of the appellant. As this letter is the central issue in this claim, we think it pertinent to reproduce it in extenso.

Private
& Confidential

MIMB
Malaysian International
Merchant Bankers Berhad

November 8, 1974

Sirs,

Sales offer of 2.75 million shares of Texsyn Fibre Industries Private Limited Texsyn Fibre Industries Private Limited.

Texsyn Fibre Industries Pte Ltd., an industrial company offers for sale 2.75 million shares to Bumiputras. Herewith attached information regarding the said company for your kind consideration.

Important particulars regarding this offer are as follows:

1. shares offered for sale (amounting to 2.75 million) is 12 1/2% of the grand total of the ordinary shares of the said company.

2. Price of each share has been fixed at $1.33.

3. The directors guarantee a dividend payment of 24% per year per share for three consecutive years from the date of purchase of this offer. The guarantee is given on a personal undertaking only.

4. Any reduction in dividend payment shall be borne by the guarantors. If the company makes profit exceeding the minimum dividend guaranteed for any one year within the 3 years, then share holders are required to pay back the said reductions to the guarantors.

5. Annual dividend assured gives an understanding that cash dividend paid from the trade profit of the company (inclusive of Bonus Dividend) but excluding the capitalisation of surplus of revaluation of the said company's assets.

6. The guaranteed dividend cannot be transferred from the initial purchasers to the subsequent buyer. The sales terminate the offer at the time of transfer.

7. Those genuine buyer of this shares are offered free airline tickets to visit the company plant at Prai.

If this offer is attractive, please contact us as soon as possible. Then we shall arrange for a meeting between our directors and you.

Sincerely,

Mohd. Tajuddin

Apart from the above letter, Mohamad Tajuddin also sent another letter dated 22 January 1975, to the effect that the company had made a profit of RM313,000 for the month of October 1974.

Mohamad Tajuddin in his evidence admitted that he gave all those information to Tan Sri Abdul Aziz but added that all those information were not made up by him but were information obtained from the company. He further added that the appellant's role in this deal was merely that of a finder ie, to get the respondent to be in touch with the company and the rest was between the respondent and the company.

According to Tan Sri Abdul Aziz in reliance of the representation, the respondent did purchase 200,000 of the designated shares in the company at RM1.33 per share totalling RM266,000. It turned out that the so called guaranteed dividend of 24% per annum never materialised and what the respondent received as dividend was a mere RM8,800 on 7 July 1977, which fell far short of the guaranteed dividend, but the respondent ought to have received on their investment of RM266,000. It also turned out that the company was in fact not of sound standing and went into receivership on 31 October 1978. Subsequently, the respondent discovered that the directors' guarantee of 24% per annum for three years, was in fact false. Nowhere in any of the documents supplied by the company was any mention made of this guarantee of 24% dividend per annum. What was contained in a letter from the company dated 9 September 1974, was that the company was prepared to increase the dividend guarantee from 1% per month to 24 cents per annum. It is clear that Mohamad Tajuddin had twisted this and made a false representation to the respondent.

On the evidence before him the learned judge found that Mohamad Tajuddin failed to ascertain or verify with the company on the accuracy of the guaranteed dividend of 24% per annum and that he had indeed painted a rosy but false picture of the company's financial standing to the respondent. Indeed the learned judge also found that the appellant failed to include a disclaimer as to their responsibility for the information supplied to the respondent.

Learned counsel for the appellant in his submission while conceding that the first representation was made, said that there were no evidence to support that the other two representations were in fact made. On the issue of the 24% guaranteed dividend, he added that while the appellant conceded that it was made, he reiterated that it was not a false representation and that it was made based on information supplied by the company. In the light of the position of the appellant as merchant bankers, it is our view that they cannot be heard to say that they are merely playing the role of a finder of bumiputra purchasers of the shares of the company and that whatever information they supplied to the appellant were simply passed on from the company. It is our view that being merchant bankers, they owe a higher duty to the respondent than that of a mere finder. They certainly owe a higher burden when supplying any information from the company to the respondent. They ought to ascertain and verify all information supplied by the company before passing on to the respondent. We agree that the first representation was actually made as it is contained in the letter from Mohamad Tajuddin to Tan Sri Abdul Aziz but we cannot agree that it was not false. The representation that the directors of the company guaranteed a dividend of 24% per annum for three years was indeed a false one, as found by the learned judge. Nowhere in the documents supplied by the company was there any mention of this guaranteed dividend. In the light of this we find that the representation is a false one and on this score alone we could have dismissed the appeal. As conceded by learned counsel for the respondent, the other two representations were indeed not made but they can be inferred from the totality of the evidence. As mentioned earlier, the appellant through Mohamad Tajuddin, painted a rosy picture of the company that it was a financially sound company and also gave the impression that any investment in it would not be a risk. Relying on these, the respondent invested in the company. It is our view that the respondent succeeded in establishing that the appellant owed a legal duty of care to the respondent and in making the representation, there was negligence which resulted in a loss by the respondent. Based on the principle laid down in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1963] 2 All ER 575, the appellant owed a legal duty to exercise such care as the circumstances require in making the representations and for their failure to do so this action for negligence was justified.

We are in agreement with the findings of the learned judge that the appellant owed a duty of care in making the representation to the respondent resulting in the loss suffered by the respondent. We have no reason to interfere with those findings. The appeal is hereby dismissed with costs, and the deposit is to go to the respondent account of their taxed costs.